DATE: APRIL 19, 1995

CASE NO: 94-INA-232

In the Matter of

WILTON STATIONERS, INC.
Employer

on behalf of

JONATHAN PHILIP SACKE
Alien

BEFORE: Jarvis, Clarke and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Wilton Stationers, Inc's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of The Case

On June 1, 1992, Employer filed a Form ETA 750 Application for Alien Employment Certification with the Connecticut Department of Labor on behalf of the Alien, Jonathan Philip Sacke. The job opportunity was listed as Sales Manager and the job duties were listed as follows:

> Prepare sales plans; meet daily with sales staff and other employees to review projections and sales figures; oversee customer relations; supervise marketing and purchasing; maintain financial and business records; overall responsibility for maintenance of music - related inventory.

Employer required familiarity with music presentation formats (records, tapes, C.D.'s) marketing thereof and purchasing thereof and listed an hourly wage of $17.50. On October 16, 1992 the Connecticut Department of Employment requested clarification of portions of the application from the Employer (AF 71). Counsel for Employer responded to the request (AF 69). Employer was authorized to advertise the position as required by the regulations (AF 65).

On March 8, 1993, Employer informed the Connecticut Department of Labor that fourteen individuals had responded to newspaper advertisements but that none of these applicants had been offered the job (AF 15). Employer's response which was prepared entirely by counsel (hereinafter discussed) stated that applicant Philip Heilman was not hired because he had "no experience with music presentation formats, marketing and purchasing thereof" (AF 23).

Since Employer's recruitment effort had been unsuccessful, the Connecticut Department of Labor forwarded the application to the regional CO. On September 16, 1993, the CO issued a Notice of Findings ("NOF") proposing to deny the application on the grounds that Employer had failed to demonstrate a good faith effort to recruit U.S. workers and had failed to establish that there were no qualified U.S. workers available to perform the job. The CO also found that applicant Heilman appeared to meet the minimum requirements for the job and Employer had not provided results about the recruitment of applicant Ellen Klein. In addition, Employer was also required to repost notice to cure deficiencies in the one posted and provide a copy of the reposted notice along with the details of its result and the disposition of any applications obtained from the posting (AF 11-14).

On September 30, 1993, counsel for Employer submitted a rebuttal to the NOF (AF 9). Counsel stated that applicant Heilman did not have the requisite experience in purchasing music store merchandise; Employer was unaware of an application by Ellen Klein and that a copy of the reposted notice was enclosed with the letter. Id.

The CO issued his Final Determination ("FD") denying certification on November 23, 1993 (AF 6-8). The FD did not mention applicant Klein and it assumed the CO accepted the rebuttal as to her. The CO found that:

> Pursuant to 656.21(b)(7) and 656.24(b)(2)(ii), the employer was requested to provide convincing documentation as to the lawful, job-related reasons for the rejection of U.S. applicant Philip Heilman. It was noted that this applicant appeared by a combination of education, training, and experience to be capable of performing in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed. Furthermore, the employer was required to repost the job opportunity as described at 656.20(g)(1)(i)(ii)(3) and provide a copy of its internal posting in which it had cured the inconsistencies/deficiencies.

The CO stated that "Furthermore, if the employer would have investigated further into Mr. Heilman's background and experience, he/she would have seen that the duties of a Record Store Manager do involve "purchasing" of various items. Therefore, the employer has not shown how this U.S. applicant (Philip Heilman) was not capable of performing the duties of the position in a reasonable manner." Additionally, the CO said that while Counsel's rebuttal letter of September 30, 1993 stated that a copy of the reposted notice was enclosed, in fact, it had not been. Also, the rebuttal did not contain the disposition of any applicants that may have applied. The CO also stated that:

> It is further noted that the evidence submitted on rebuttal to clarify the rejection of the cited applicant was submitted and signed by the attorney, not the employer. It is highly inappropriate for the attorney to report on the results of recruitment.

On December 2, 1993, Employer's Counsel filed a letter with the CO which had attached thereto a letter to Counsel from the Owner/President of Employer (AF 75) dated November 18, 1993 which stated that the notice had been reposted and that there had been no response. A copy of the reposted notice was attached (AF 3-5).

Employer filed a request for review on January 3, 1994 (AF 1). The grounds for review are that: (1) The CO improperly assumed that since Heilman had been the manager of a record store that he had purchasing experience which is a requirement for the position; (2) Proof of Notice of reposting and its results were timely furnished to the CO; (3) Employer's Counsel, as its agent, was entitled to respond in its behalf on results of recruitment.

Discussion

I. The Role of Counsel

Since this issue affects the other two, it is discussed first.

It is well-settled that assertions of an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. Moda Lines, Inc., 90-INA-424 (Dec. 11, 1991); Mr. and Mrs. Elias Ruiz, 90-INA-446 (Dec. 9, 1991); Personnel Services, Inc., 90-INA-43 (Dec. 12, 1990). An attorney cannot execute a certificate of service if he did not mail or personally serve the document. An attorney cannot authenticate the business records of a client unless he is the custodian thereof. An attorney cannot testify about events unless he was present.

II. Failure To Provide Documentation of Reposting

Reposting of the notice was required by 656.20(g)(ii). The CO had the duty and right to request documentation thereof. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc). The September 30, 1993 letter from Employer's Counsel was not sufficient. Counsel did not do the posting and was not a percipient witness. The notice which was posted was not attached to the letter.

The NOF issued on September 16, 1993 required the documentation to be submitted by October 21, 1993 (AF 11). As indicated, the September 30th letter of rebuttal was not sufficient. The FD was issued on November 23, 1993. The letter from Employer's Counsel which attached a statement of reposting by the owner/president and a copy of the reposted statement was received by the CO on December 2, 1993. This rebuttal was not timely filed and cannot be considered on review. Bowery Savings Bank, 89-INA-086 (January 18, 1990). The CO properly denied certification for failure to furnish the required documentation.

III. Applicant Heilman

The CO denied certification on the grounds that Employer failed to demonstrate a good faith effort to recruit U.S. workers and failed to establish that there were no qualified U.S. workers

available to perform the job. After rebuttal, the CO's denial was based on the rejection of Applicant Heilman.

The Employer specified purchasing experience as a special requirement for the job and listed it as one of the job's duties (AF 74). This requirement was not contested by the CO. Thus, if Heilman lacked purchasing experience, the Employer could reject him for a lawfully-related reason.

Employer's response to recruitment was prepared by its Counsel who did not interview Heilman (AF 23). Except for Applicant Palomares, all applicants were rejected with the same conclusion: "No experience with music presentation formats, marketing and purchasing thereof". Since Counsel did not interview Heilman, his conclusion that the applicant had no purchasing experience is entitled to no weight.

The CO found that if Employer had further investigated Heilman's background and experience, it would have seen that his experience included being a Record Store Manager which duties the CO determined included purchasing (AF 7). The CO's conclusion is correct as to further investigation and overstated as to whether the job of Record Store Manager necessarily includes purchasing of music presentation formats, or equivalent, in all instances.

The resume Heilman furnished to Employer included the following:

> ONE STOP DISTRIBUTORS, Atlanta, Ga
> Retail record store manager
> Managed and merchandised albums , tapes , and musical instruments , trained staff ranging from five to eight, designed promotional displays for five separate stores winning several national contests for CBS and A&M Records; relocated five time to stores of higher volume and responsibility; all duties expected thereof by a store manager. Salary $18,500 (AF 24).

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 1990)(en banc); Nationwide Baby Shops, Inc., 90-INA-286 (Oct. 31, 1991); The First Boston Corp, 90-INA-059 (June 28, 1991).

In the light of Heilman's resume, Employer had the duty to interview him to determine if he had any purchasing experience. In a response to the Connecticut Department of Labor, Heilman stated that he was interviewed by Michael Greenberg (the Owner/President of Employer) and that Greenberg indicated applicant was qualified for the position but Greenberg said he was not making a decision at that time (AF 56). As indicated, the Employer's response to recruitment was prepared by counsel and is entitled to no weight. Similarly, there is nothing in the record to support Counsel's representation in the rebuttal letter of September 30, 1993 that:

> At no time was Mr. Heilman involved in merchandise "purchasing" when he worked for One Stop Distributors. While working at One Stop Distributors, he was involved in managing, merchandising, training staff and designing promotional displays. Since he does not satisfy the requirement for this job in experience in purchasing music store merchandise, he does not have the qualifications required for this position (AF 9).

Greenberg interviewed Heilman. No statement by or notes of Greenberg about the interview were provided to the CO. It was relatively simple, and Greenberg's duty, to ask Heilman if he had purchasing experience. The First Boston Corp, supra. There is nothing in the record to establish that Greenberg asked the question and received a negative response. Heilman's version of the interview is that Greenberg said he was qualified (AF 56).

I find that Employer has failed to carry its burden of proof that Heilman was not able, willing, qualified or eligible because of lawful job-related reasons. 20 C.F.R. §655.106(i).

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, CA

DBJ/bg